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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 637

UNDERWRITERS AT LLOYD'S LONDON, SUBSCRIBING POLICY NO. [illegible],

Petitioners,

v.

ADELE A. LAND,

Respondent.

THE GUARDIAN ASSURANCE COMPANY, LTD., THE PROVINCIAL ASSURANCE COMPANY, LTD., and THE UNITED SCOTTISH ASSURANCE COMPANY, LTD.,

Petitioners,

v.

ADELE A. LAND,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 637.

UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING LLOYD'S POLICY NO. DB 6 234.

Petitioners.

against

ADELE L. RAND,

Respondent.

THE GUARDIAN ASSURANCE COMPANY, LTD., THE PRUDENTIAL ASSURANCE COMPANY, LTD., and THE UNITED SCOTTISH INSURANCE COMPANY, LTD.

Petitioners.

against

ADELE L. RAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals (printed at 1b)* is reported at 295 F. 2d 342.

* References in parentheses where number is followed by "a" are to Joint Appendix to Record in Court of Appeals; where number is followed by "b", to Appendix to Petition.

Question Presented

Whether the Court of Appeals erred in holding that the question as to whether plaintiff complied with the notice provisions of two livestock insurance policies was properly submitted to the jury.

Statement of the Case

Petitioners' statement of the "indisputable facts" established at the trial below, although not inaccurate as far as it goes, is incomplete and to that extent misleading. In the following statement, the salient facts omitted by petitioners are set forth in italics.

Plaintiff purchased Tom F. Jr., a yearling, from A. B. Hancock, Jr. in January 1956 for $38,000 (17a, 18a, 23a). The colt remained at the Hancock farm until July 1956, when it was sent for training to the John Ward Farm, an independent training farm in Lexington, Kentucky (23a, 87a, 168a).

While at the John Ward Farm, after a physical examination of the horse on November 2, 1956 by Dr. Arthur H. Davidson, a veterinarian, who found it to be sound and normal in every respect (175a), the policies in suit were issued by the defendants, insuring against loss through death of the horse from November 3, 1956 to November 3, 1957 in the aggregate amount of $38,000 (171a, 173a).

Condition 4 of each policy provides:

> "In the event of any illness, lameness, accident, injury or physical disability whatsoever of an insured animal, the Assured shall immediately give notice to . . . by telephone or telegram, who will instruct a Veterinary Surgeon on Underwriters' [Insurers'] behalf if deemed necessary. . . ."

Later in November of 1956, Tom F. Jr. was shipped for the winter with the other Rand yearlings to the Columbia Training Stable, a more advanced training farm in Columbia, South Carolina (24a, 25a, 87a, 88a). There, the horse was trained along with the other 23 or 24 Rand horses by William W. Stephens, the Rand trainer, from November 1956 until the latter part of March 1957 (90a).

While at Columbia, sometime in the latter part of January 1957, Tom F. Jr. showed a "weakness" or "slight catch" in his hindquarters (91a). Stephens immediately called in a veterinarian, Dr. William H. Wright, to examine him (93a, 107a). Dr. Wright, *who regularly looked over the Rand horses in Columbia three or four times a week, made a routine examination* and X-ray of the horse on January 29, 1957 (70a, 73a, 94a). Dr. Wright did not prescribe any treatment other than recommending that the horse be given 30 days rest. *In two or three days Tom F. Jr. had walked out of the catch and was walking in a completely normal manner* (94a). *Dr. Wright saw the horse again after four or six weeks and found him to be "perfectly all right"* (76a, 77a). *Tom F. Jr. resumed training and showed no evidence at all of a catch, but walked and galloped normally* (95a).

The condition Dr. Wright found in his X-ray of January 29, 1957 was a condition which is "very common" in a horse the age of Tom F. Jr., lameness being a very usual condition in young horses (80a, 83a). *The X-rays showed only what was "very, very common" in 18 out of every 20 young horses, the kind of thing that in 30 or 40 days is taken care of by the normal processes of nature* (95a, 107a).

In late March of 1957, Tom F. Jr., along with the other 23 or 24 Rand horses, was shipped to Belmont Park, New York, for racing (90a, 96a). In April 1957, while at Belmont,

Stephens noticed a recurrence of the catch, and that Tom F. Jr. wasn't handling himself "properly and gracefully" (111a). At Dr. Wright's suggestion, the horse was returned to the John Ward Farm for a rest, "not an unusual thing with race horses" (78a).

Stephens asked Ward to have Dr. Davidson, the same veterinarian who had examined the horse on November 2, 1956 for the purpose of determining its insurability (46a, 174a), look at the horse (97a). Ward reported to Stephens that the horse only needed a couple of months of being "turned out", and that then "he would be a hundred per cent all right" (97a).

Dr. Davidson first took X-rays of the horse in April 1957, but the condition revealed in those X-rays was well healed on subsequent X-rays, and did not contribute to the lameness for which Tom F. Jr. was later destroyed (59a). The condition which resulted in Dr. Davidson's recommendation that the horse be destroyed was first observed by him in July or later, 1957 (65a).

Between April and July 1957, Dr. Davidson had the opportunity of observing Tom F. Jr. on numerous occasions, and noted that his condition at first improved and then remained unchanged (50a).

In July 1957, Dr. Davidson took another set of X-rays but made no report of the results either to Mr. Rand, Mrs. Rand, the trainer Stephens, or the assistant trainer Rienzi (50a).

Dr. Davidson never informed either the Rands or their trainers of what he had discovered at either of the examinations which he made of Tom F. Jr. in April and July of 1957 (44a, 49a, 50a, 97a, 99a).

Stephens, due to the fatal illness of his father, was again in Lexington on or about August 29, 1957, at which

time he was first advised by Dr. Davidson that the condition of the horse was such that he thought the insurance companies should be notified (100a, 101a). Stephens telephoned the Rands in New York, who immediately notified the insurance companies (29a, 30a). This was the first time that the veterinarian, Dr. Davidson, had advised that such notice should be given (30a, 39a, 44a, 66a, 67a, 101a). The defendant insurance companies denied liability on the ground of alleged late notice.

On November 2, 1957, Tom F. Jr., on Dr. Davidson's recommendation, was destroyed for humane reasons (54a). Prior to its destruction, however, the horse was examined by a veterinarian on behalf of the insurance companies, Dr. Horace Davis of Lexington, Kentucky, who reported that Tom F. Jr. had received good care and that he, Dr. Davis, would have done nothing different than Dr. Davidson had done (134a). He agreed with Dr. Davidson's recommendation that the horse be destroyed (134a), but did not suggest anything more that could have been done, nor was he in any way critical of Dr. Davidson's treatment of the animal (55a).

Argument

The issue in the present case is a "narrow and precise" one (Pet., p. 2) on which a review by this Court on certiorari is not warranted.

Nothing is involved here but a question of pure contract law, the construction of a notice clause in a livestock insurance policy. The District Court for the Southern District of New York (152a, 158a) and the Court of Appeals for the Second Circuit (5b, 7b) have both found that "immediate notice" in such a policy means "notice within a reasonable time under all the circumstances", and

that, where the facts permit different interpretations to be given the question of the reasonableness of the notice is for the jury to decide.

It should be noted that this case has been reversed—and remanded for a new trial (13d), and that therefore it is a non-final judgment which bettioners are asking this Court to review.

There is no conflict of decision involved here, not any important federal question. Petitioners are simply seeking another review of an issue which has already been twice decided against them.

The claim of petitioners that the decision below would open the door for admission of "a host of small cases to Intrigs in all federal courts throughout the United States" (Pet. p. 8) is not only irresponsible, but should be borne upermost in the mind of the reader because petitioners have been unable to find one case, either jury or non-jury, in the United States of Any Sort involving this type of insurance contract, and in their brief have cited a total of only two cases—all from state courts in Illinois. Two and Kentucky—one of which was decided almost forty years ago, in 1854.

• Defendants abbreviated from the judgments entered in the District Court on two grounds: (1) that the Court erred in denying defendants' motion for directed verdicts since there was no issue of fact to go to the jury; and (2) that even if the case was properly submitted to the jury, the Court erred in its charge to the jury (4b). The Court of Appeals reversed only on the second ground. Accordingly, it is only the Court's decision on the first ground that is sought to be reviewed here.

** Green Bros. v. Northwestern Life Stock Insurance Co., 27 Iowa 328, 24 N. W. 348 (1893); Hooper v. Kansapkan Life Stock Insurance Co., 105 Ill. App. 187 (1902); Lowenthal v. Columbia Life Stock Insurance Co., 502 Ill. App. 52, 117 (1953); Hardy v. Kansapkan Life Stock Insurance Co., 530 Ill. App. 341 (1953); Hartford Life Stock Insurance Co. v. Hemmid, 308 Ky. 9, 302 S. W. 818 (1954).

I

The decision below is not in conflict with applicable State or Federal law.

Petitioners claim that in the decision below the Court of Appeals for the Second Circuit "is in conflict with" the decisions of this Court in Kansas v. Colorado, 206 U. S. 46, 117 (1907); Rexford Knob Ice Co. (1) (d) of this Court." (Pet. p. 4). That Rexford Knob Ice Co. case is in complete conflict with the decision below is a mere assertion of petitioners' counsel, unsupported by any reference to the opinion in the case. The decision below is not in conflict with the decision in the Kansas v. Colorado case, supra, for the reason that the latter case was decided upon the basis of the law of the State of Kansas, while the decision below was decided upon the basis of the law of the State of New York. The Kansas case, supra, was decided upon the basis of the law of the State of Kansas, while the decision below was decided upon the basis of the law of the State of New York. The Kansas case, supra, was decided upon the basis of the law of the State of Kansas, while the decision below was decided upon the basis of the law of the State of New York. The Kansas case, supra, was decided upon the basis of the law of the State of Kansas, while the decision below was decided upon the basis of the law of the State of New York. The Kansas case, supra, was decided upon the basis of the law of the State of Kansas, while the decision below was decided upon the basis of the law of the State of New York. The Kansas case, supra, was decided upon the basis of the law of the State of Kansas, while the decision below was decided upon the basis of the law of the State of New York. The Kansas case, supra, was decided upon the basis of the law of the State of Kansas, while the decision below was decided upon the basis of the law of the State of New York. The Kansas case, supra, was decided upon the basis of the law of the State of Kansas, while the decision below was decided upon the basis of the law of the State of New York. The Kansas case, supra, was decided upon the basis of the law of the State of Kansas, while the decision below was decided upon the basis of the law of the State of New York. The Kansas case, supra, was decided upon the basis of the law of the State of Kansas, while the decision below was decided upon the basis of the law of the State of New York.

A. The Decision Below Does Not Conflict With Zauderer.

Petitioners assert that the decision below conflicts with the following "ruling" in *Zauderer*:

> "Apparently it is true in New York, if all the facts are undisputed, that the court will not leave to a jury, but will decide for itself, whether the delay has been 'unreasonable.'" (Pet., pp. 4, 12).

That this statement as to the "apparent" law of New York is merely dictum is shown by the sentence in the *Zauderer* opinion which immediately follows the one quoted above, which held:

> "Since that is not a matter of substantive law, those decisions are not indeed authoritative upon us." (140 F. 2d 211, 214).

The statement as to the law of New York was entirely unnecessary for the decision of the case, since it was held that the law of New York did not apply. It is a settled rule "that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits."* Since the court decided that New York law did not apply, its dictum as to what was apparently the law of New York is of no value as precedent.

What the *Zauderer* case *held*—apart from what was said therein by way of dictum—was that the question of the reasonableness of the delay in giving notice was not a matter of substantive law, and that, therefore, the law of New York as to whether this question should be decided

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* *Harriman v. Northern Securities Co.*, 197 U. S. 244, 291; 25 S. Ct. 493, 502, 49 L. Ed. 739, 761 (1905); *M[illegible] v. O[illegible]*, 138 F. 2d 581, 586 (1943); *Coen v. American Surety Co. of New York*, 120 F. 2d 393, 400 (1941); *Ingo v. Koch*, 127 F. 2d 667, 672 (1942).

claim in their petition for rehearing that the Court of Appeals *was* in conflict with its prior decision in the Zanderer case. This is understandable in view of the fact —as shown above—that the court below had *followed* Zanderer in reaching its decision here. Petitioners' belated discovery of an alleged conflict *with Zanderer* is patently a desperate effort to find some ground, where none exists, for issuance of a writ of certiorari here.

Petitioners argue that this case is "quite unlike" *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.** (cited in opinion below at 7b) because here the "respondent put in all the evidence."** There is nothing in Byrd to give any indication that this factor had any bearing on the decision of the Court.

Byrd, a diversity suit, held that in a federal court a certain issue was to be decided by the jury, notwithstanding decisions of the state court which held the question to be one for the court. The Court said:

"The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that

* 356 U.S. 525, 2 L. ed. 2d 953, 78 S. Ct. 893, reh. den. 357 U.S. 933, 2 L. ed. 2d 1375, 78 S. Ct. 1360 (1958).

** It is not clear why petitioners repeatedly emphasize that "all testimony" was "provided by witnesses of respondent", that "respondent put in all the evidence," and that "respondent summoned and put on its witnesses" (Pet., pp. 10, 13). In the first place, these statements are not true, since petitioners put in evidence testimony on page 141 of the record. In the second place, the fact that petitioners, for reasons of their own, chose not to call any witnesses to the stand, including Dr. Horace Davis, a veterinarian who examined Tom F. Jr. on their behalf, who reported that Tom F. Jr. had received good care, that he would have done nothing different than Dr. Davidson had done and who was in no way critical of Dr. Davidson's treatment of the animal (34a, 35a, 134a)—while perhaps understandable, hardly seems to strengthen petitioners' position either legally or equitably.

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B. The Decision Below Does Not Conflict With Applicable State Law.

This is a diversity suit and therefore, as held by the court below, the substantive rights and liabilities of the parties are governed by *New York* law (4b).

The only question of *New York* substantive law here involved is the meaning of the phrase "immediate notice" in the two insurance policies. The court below correctly held that *New York* courts have always read into such contracts an element of "reasonableness", saying:

> "When interpreting 'immediate notice' the *New York* courts have consistently applied a so-called rule of 'reasonableness' by *which* to define the time when the insured must give the insurer a notice of a loss or of a changed condition (as an accident) if the contract of insurance is not to be made void for delayed notice. *They have held that 'immediate notice' means 'notice within a reasonable time under all the circumstances.'*" (5b. Emphasis added.)

Petitioners do not seriously argue with this proposition and practically concede that "immediate notice" does mean "notice *within* a reasonable time".* They cite no cases, either from *New York* or elsewhere, to the contrary. Their only argument is as to *who* shall determine what is "reasonable",—the court or the jury.

As shown in Point A above, the court below *was not* bound by *New York* law on this question, since it is not a matter of substantive law.

However, even if *New York* law did determine whether this question *were* to be decided by a court or by a jury,

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* "Petitioners do not advocate that this or any other court be other than reasonable in deciding any case. They respectfully suggest that any result other than judgment on their behalf is unreasonable." (Pet., p. 17.)

difficult of application, and results in the question *being left to a jury when it is near the border line*." (Greenwich Bank v. Hartford Fire Ins. Co., 250 N. Y. 116, 131, 164 N. E. 876, 881 (1928). (Emphasis added.)

The court below correctly summarized New York law as follows:

"Therefore, in New York, when dissimilar inferences *may be drawn from undisputed facts, or when the facts are in dispute*, 'reasonableness' is a jury question." (8b).

The court then applied this undeniable principle to the instant case, saying:

"The basic facts relative to the health of Tom F., Jr. that were presented at the trial squarely put in issue the question of whether the proverbial 'reasonably prudent man' would have given notice to the insurers of his condition under all the circumstances at any earlier date than September 4, 1957. Certainly the facts are *subject to more than one interpretive inference*. Under such circumstances the question *was properly one for the jury*." (8b. Emphasis added.)

Thus, even if petitioners were correct in claiming that the question of whether the issue of reasonableness should have been decided by the court or by the jury is a question that should have been decided according to New York State law, no error was committed by the court below. For it is abundantly clear under the New York authorities that in a New York State court this issue would have been submitted to the jury.

Even the cases cited by petitioners from jurisdictions outside New York (which have no application here) offer

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The *Zanderer* case was also cited by the court below (7b) as authority for holding that it *was* not bound by *New York* law in deciding *whether* the question of reasonableness of this notice should be decided by court or jury. (See (b) above.)

Petitioners have ignored the fact that the court below referred to *Zanderer* in these *two* different contexts. Significantly, however, in both contexts, the court followed *Zanderer* and did not in *any way* conflict with it.

Thus, the court, both in *Zanderer* and in the instant case, followed *New York* substantive law to the effect that "immediate notice" means "reasonable notice". Singlarly, the court both in *Zanderer* and in the instant case held that the question of whether notice *was* given in a reasonable time *was* a matter for the jury. In both cases, the Court of Appeals held that the District Court had correctly denied the motion for a directed verdict, and in both cases it affirmed the jury verdict on the issue of whether notice had been seasonably given. The only difference in the two cases is that in *Zanderer* it *was* the plaintiff who appealed from a denial of a motion for a directed verdict after the jury had found for the defendant, whereas in the instant case defendants appealed from the denial of a motion for directed verdicts after the jury had found for the plaintiff. Obviously, this distinction has no legal significance.

Petitioners' continual references to the "undisputed" and "uncontroverted" facts allegedly adduced from the evidence at the trial below (Pet., pp. 3, 4, 5, 10, 12), as if that automatically eliminated any question for the jury, completely ignores the basic proposition that, where facts permit more than one inference to be drawn, it is for the jury to determine *which* is the proper inference. It also ignores the equally basic principle that *where* mitigating

circumstances are offered as an excuse for delay, the reasonableness of the delay is a matter for the jury. Both of these principles obtain to create a direction for the jury when that of not the facts are undisputed. As stated by the court below: "The facts are employed to more than one interpretive interference," and therefore "the direction was proper in this case for the jury."

Even in Kansas, when multiple petitioners appear, each bring recent reliance, the court said:

> "When some excuse is offered for admitted delay, the direction ordinarily must two aspects: one of which is concerned for the jury." (140 F. 2d 511, 514. Emphasis added).

The court in Kansas went on to say that the direction "must that facts but a mere upon inquiry," has been treated as a direction of fact (and hence for the jury) and that this is in accord with the *New York* law. Ibid.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated, New York, N. Y.,
January 24, 1963.

Respectfully submitted,

Leo T. Kissam,
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Leo T. Kissam,
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Supreme Court of the United States

OCTOBER TERM, 1961

No. 637

UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING LLOYD'S POLICY NO. DB 6 234,

Petitioners,

against

ADELE L. RAND,

Respondent.

THE GUARDIAN ASSURANCE COMPANY, LTD., THE PRUDENTIAL ASSURANCE COMPANY, LTD., and THE UNITED SCOTTISH INSURANCE COMPANY, LTD.,

Petitioners,

against

ADELE L. RAND,

Respondent.

REPLY TO RESPONDENT'S BRIEF

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 637

Underwriters at Lloyd's, London Subscribing Lloyd's Policy No. DB 6 234,

Petitioners,

against

Adele L. Rand,

Respondent.

The Guardian Assurance Company, Ltd., The Prudential Assurance Company, Ltd., and The United Scottish Insurance Company, Ltd.,

Petitioners,

against

Adele L. Rand,

Respondent.

REPLY TO RESPONDENT'S BRIEF

In reply to the brief in opposition to certiorari, petitioners submit the following comments.

First

Respondent's statement of the case is seriously deficient in that

(a) It *omits* that portion of Condition 4 which makes it unique as against all prior precedents. The omitted portion reads: "The Assured's failure

to report the illness, lameness, accident, injury or physical disability as above provided * * * shall render Assured's claim null and void and release Insurers * * * from all liability in connection therewith." There was no such or similar provision in any precedent upon which the majority below relied.

(b) While conceding petitioners' statement of facts is "not inaccurate", an endeavor is made to amplify same in italics. By this addenda nothing is established other than respondent's witnesses testified that the "condition" was "very common" and "lameness is a usual condition of race horses." Petitioners' policies speak primarily of "any lameness * * * or physical disability." The added matter is but further ground for this Court to take the case and give petitioners judgment. The policy is silent on the commonness or uncommonness of lamenesses or disabilities. The Court of Appeals found unanimously that the trial court erred and held:

> "It is not the insured's opinion of what is or is not a serious ailment that determines when notice must be given under the policy, for the policy says nothing about serious or non-serious lamenesses."

The same rule applies to broken legs, be they common or uncommon.

(c) The further italicized material *omits* the fact respondent's veterinarian Wright took X-rays in January and admits that her agent Dr. Davidson also took them in April and July, although he did not inform respondent of his discoveries. If true, this evidence cannot impose an obligation upon petitioners for they must not bear the consequences of any dereliction on the part of respond-

ent's veterinarians or other agents. Judge Hincks said in this case:

> "But here there was neither pleading nor evidence of any mitigating circumstances."

Not only is this factually correct but even the trial Court refused to charge that there were extenuating circumstances.

Second

The pervading reason this Court should hear this case is that the majority below has held that this is a matter for a jury and that the question "judge or jury" is one of federal law. Petitioners contend that this case cannot possibly be for a jury and that upon this important question of federal law this Court should be the final arbiter, charged as it is with the duty to supervise the procedure of all federal courts. Every insurance policy has a condition with respect to notice. The majority decision affects all insurance contracts, not only livestock policies, as argued on page 6 of respondent's brief. Indeed, the question is serious enough to warrant review, if only that type of policy was affected.

Third

Respondent's Point I A. urges as "dictum" Judge Learned Hand's statement in *Zaudere* that New York courts will not leave to a jury but will decide for themselves whether a delay in giving notice is "unreasonable". She ignores his cited New York authorities, also *Zurich Gen. Acc. & L. Ins. Co.* v. *Harbil Rest. Inc.*, 7 A. D. 2d 433, 184 N.Y.S. 2d 51, 53, where in 1959 it was held by the N. Y. Appellate Division:

> "• • • where an insured fails to show a reasonable excuse or the existence of circumstances which would justify a protracted delay, the Court should *as a matter*

of law hold that there had been a breach of the condition as to notice." (Emphasis ours)

And this under a condition subsequent type of notice clause requiring notification "as soon as practicable" not a condition precedent to loss stipulating for notice by telephone or telegram with release of the insurers the consequence of non-compliance! Insofar as it endeavors to apply New York law to this case, the majority is also in error and Rule 19(b)(1) of this Court should be invoked in favor of petitioners.

Fourth

In her endeavor to distinguish the *Byrd* decision of this Court, respondent omits reference to the qualification in the dissent of Justices Frankfurter and Harlan, page 588, that the case would be for the jury "if there were any crucial facts in controversy." The disagreement among members of this Court in that litigation was confined to the question of whether there might be disputed issues of fact if petitioner put in further proof. In the matter at bar, there are no disputed questions of fact and implicit in the opinion of even the majority in *Byrd* is the conclusion that the question is for the court, under federal law, in a case such as that at bar.

Fifth

The balance of respondent's brief urges that a matter is for the jury where different inferences can be drawn from the same facts. Neither respondent nor any jurist has suggested any inference other than non-compliance with Condition 4. None possibly could be drawn in this case. The conclusion is inescapable that the condition was breached, petitioners are released and that this Court should right the wrong done petitioners by insistence of the majority below upon another jury trial.

CONCLUSION

This Court should grant the writ and give petitioners judgment.

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